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Regime pluralism and the global regulation of oil pollution liability and compensation

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Abstract

Whilst international law has traditionally been dominated by states, non-state actors today have an increasing influence on many spheres of international life. This paper argues that non-state actors, in particular business interest non-governmental organisations (BINGOs), not only participate actively within those inter-governmental regimes which have been created by states, but they are also able to establish their own private regimes on particular issues in which they have an interest. The global regulation of oil pollution liability and compensation is used as an example to show how inter-governmental and private regimes can overlap and interact with one another. Such interplay poses several challenges for the way in which we understand traditional state-centred international law-making. At the same time, private regimes themselves raise their own questions of legitimacy and effectiveness.

1 Introduction

Perhaps one of the most remarkable developments in international law in the past century has been the challenge to the dominance of the state in international relations due to the increase in the number and variety of non-state actors operating at the international level.[1] Whilst such non-state actors do not have the same status as states in terms of international law, they have nevertheless come to have a significant bearing on the way in which international law is made through their participation in international organisations, conferences and other law-making activities.[2] Yet, non-state actors are also increasingly able to operate independently of states at the global level. This process of globalisation opens up the possibility of new forms of global law which sidestep state-dominated international law-making processes altogether.[3] At the same time, these two forms of law-making do not exist in isolation. It is the co-existence of various regulatory regimes involving a variety of actors at the global level that is the topic of this paper. It will focus on a case-study concerning the regulation of oil pollution liability and compensation. Two different forms of global regime in this area will be analysed. In the first place, the paper will consider the inter-governmental regime on oil pollution compensation and liability. This section will analyse the degree to which the inter-governmental regime allows for the participation of non-state actors. Second, the paper will consider the influence of non-state actors on law-making outside the formal framework of the inter-governmental regime. This section will analyse a number of 'private' regimes created by international business associations which seek to regulate oil pollution liability and compensation at a global level. In doing so, the paper will consider the consequences of emerging private regimes for traditional state-centred international law-making processes.

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1 See, e.g., American Society of International Law (1998, p. 20); Hofmann (1998).

2 See, e.g., Boyle and Chinkin (2007, pp. 46–97).

3 See, e.g., Teubner (1997). See also section 3.1 below.

2 The inter-governmental regime for oil pollution liability and compensation

2.1 The establishment of the inter-governmental regime

The inter-governmental regime[4] on oil pollution liability and compensation was developed under the auspices of the International Maritime Organisation[5] (IMO) following the sinking of the *Torrey Canyon* in March 1967. This incident starkly illustrated the legal complexities that could arise in the case of a major oil spill and the need for international regulation. The IMO was quick to start work on drafting an international instrument to ensure that prompt and effective compensation was available to victims of oil pollution, as well as promoting uniform international rules and procedures for determining questions of liability in the case of an oil spill. As a result of this diplomatic activity, two instruments were adopted by states at two international conferences in 1969 and 1971.

First, the 1969 Convention on Civil Liability for Oil Pollution Damage[6] placed strict liability on tanker-owners for oil pollution damage whilst permitting them to limit their liability according to the size of their vessel.[7] In addition, all tankers carrying more than 2000 tons of oil were required to carry compulsory insurance[8] and the victims of oil pollution were granted a right of recourse against the insurers of a polluting ship.[9]

Second, the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage[10] created a supplementary scheme of compensation in the form of an International Fund financed by the oil industry. Victims of oil pollution damage could claim against the International Fund if the total damage exceeded the limits of liability established by a tanker-owner under the Civil Liability Convention. As with the liability of tanker-owners, liability of the International Fund was also limited.[11]

Together, these instruments formed a two-tier system for liability and compensation in cases of oil pollution damage from tankers. Central to the regime is the idea of a balance of liability between the owners of the tankers which transport the oil on the one hand, and the importers of the oil on the other hand. As noted by Birnie and Boyle, 'the combined effect of the Oil Pollution Liability and Fund Conventions is . . . that in more serious cases, the owners of the ship and the owners of the cargo are jointly treated as the polluter and share equitably the cost of accidental pollution damage arising during transport' (Birnie and Boyle, 2002, p. 386). At the same time, the costs of any damage in excess of the liability limits set by the two treaties must be borne by the victims of the oil pollution incident.

The original treaties were replaced in 1992 by an amended regime which significantly raised the limits of liability for both tanker-owners and the International Fund, whilst maintaining the overall

4 A popular definition of a regime is provided by Krasner: 'Regimes can be defined as sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations' (Krasner, 1982, p. 186). It follows that the term 'inter-governmental regime' in this paper will be used to refer not only to the rules and procedures found in the treaties but also to the rules, principles and practices developed in the implementation and oversight of the treaties. See section 2.2 below.

5 At the time, this institution was called the Inter-governmental Maritime Consultative Organisation. It changed its name to the International Maritime Organisation in 1982.

6 1969 Civil Liability Convention (1970) *International Legal Materials* 9: p. 45. The Civil Liability Convention entered into force on 19 June 1975.

7 1969 Civil Liability Convention, Articles III–V.

8 1969 Civil Liability Convention, Article VII(1).

9 1969 Civil Liability Convention, Article VII(8).

10 1971 Fund Convention (1972) *International Legal Materials* 11: p. 284. The Fund Convention entered into force on 16 October 1978.

11 1971 Fund Convention, Article 4.

balance of liability between the two groups.[12] The modified regime has achieved almost global application.[13] In all, 121 states are party to the 1992 Convention on Civil Liability for Oil Pollution Damage,[14] whereas 102 states are also a party to the 1992 Convention on the Establishment of an International Fund for Compensation for Compensation for Oil Pollution Damage.[15]

As depositary for the treaties, the IMO has certain responsibilities in relation to the implementation of the regime. In particular, the IMO plays a leading role in the adoption of amendments to the regime. Under both treaties, amendments are to be adopted by a diplomatic conference convened by the IMO.[16] Furthermore, the IMO Legal Committee may itself adopt amendments to the compensation and liability limits using a special tacit amendment procedure.[17]

In addition, the 1992 Fund Convention creates a new international organisation called the International Oil Pollution Compensation Fund,[18] whose main functions are to manage and administer the financial contributions from oil importers, as well as to facilitate the settlement of the claims of oil pollution victims.[19] The principal organ of the International Fund is the Assembly, which consists of all contracting states to the Fund Convention.[20] The Assembly is responsible for instructing the Director of the Fund concerning the proper execution of the Convention as well as adopting a budget, fixing financial contributions from oil importers and approving settlements of claims made by individuals against the Fund.[21]

It is within the institutional framework provided by these organisations that the inter-governmental regime operates. The following section will consider which international actors are involved in its implementation.

2.2 State and non-state participation in the inter-governmental regime

Within both the IMO and the International Fund, it remains the case that states are the dominant actors. It is only states who are formal members of these institutions and, as a consequence, only states have a vote in decisions on the implementation, modification or amendment of the two treaties underpinning the inter-governmental regime.

At the same time, it must also be recognised that participation in the inter-governmental regime is open to certain non-state actors, in particular international non-governmental organisations (NGOs). Provision for the involvement of international NGOs in the organs of the IMO and the

12 See, e.g., Faure and Wang (2003, p. 246).

13 The major exceptions are the United States and China.

14 www.imo.org/Conventions/mainframe.asp?topic_id=247 [checked 4 August 2009]. This figure represents 96.39% of World Tonnage. 38 states are still party to the 1969 Civil Liability Convention.

15 www.iopcfund.org/92members.htm [checked 4 August 2009]. Iran and Syria will also become Members of the Fund in November 2009 and April 2010 respectively. The original 1971 International Fund ceased to be in force on 24 May 2004 and it does not apply to any incidents occurring after that date. The 1971 International Fund is in the process of being wound up. See *IOPC Funds Annual Report 2004* (2005, p. 25).

16 1992 Civil Liability Convention, Article 14; 1992 Fund Convention, Article 32.

17 1992 Civil Liability Convention, Article 15; 1992 Fund Convention, Article 33. Not all parties to the treaties may be members of the IMO. However, the treaties provide that if a party to one of the Conventions is not otherwise an IMO Member, it may nevertheless participate in sessions of the Legal Committee where proposals relating to the Convention are under discussion; 1992 Civil Liability Convention, Article 15(3); 1992 Fund Convention, Article 33(3).

18 1992 Fund Convention, Article 2(1). Hereinafter, the International Fund. An additional international organisation is created by the 2003 Protocol.

19 1992 Fund Convention, Article 18.

20 1992 Fund Convention, Article 17.

21 1992 Fund Convention, Article 18.

International Fund is found in both the IMO Convention[22] and the 1992 Fund Convention.[23] Currently 65 NGOs have consultative status IMO,[24] whereas 16 NGOs have observer status at the International Funds.[25] It is important to note that these NGOs do not have a *right* to participate in these institutions. Access to the regime is regulated and the involvement of NGOs must be approved in advance by the member states of these organisations. Moreover, in both organisations, NGOs must meet certain criteria which have been set by the member states. For instance, according to the criteria adopted by the International Fund, to qualify as an observer, an NGO must possess a 'truly international character' and its objectives must be in harmony with those of the 1992 Fund.[26] Moreover, an NGO must be able to 'make a contribution to the work of the 1992 Fund, for example by providing specialised information, advice or expertise, or by identifying or helping to procure the services of experts or consultants, or by otherwise furnishing technical assistance or by making research facilities available'.[27] Observer status within the International Fund is reviewed every three years and it may be withdrawn if the Assembly considers that there is no further advantage to the 1992 Fund in continuing to permit participation.[28] Similar criteria are applied by the IMO when granting consultative status to NGOs.[29]

Many of the NGOs which do participate in the inter-governmental regime seek to represent private interest groups involved in the maritime sector. Whilst profit-seeking companies are not directly involved in the operation of the inter-governmental regime, commercial interests are represented at the global level through a variety of so-called Business Interest Associations (BIAs) or Business Interest Non-Governmental Organisations (BINGOs).[30] Such groups play a variety of roles, including information gathering and technical assistance, as well as lobbying at the national and international level.[31] Within this category of NGOs involved in the inter-governmental regime on oil pollution liability and compensation, there is a variety of different interest groups whose objectives and values are not always compatible.

Shipping interests in this area are primarily represented through two international bodies. The *International Chamber of Shipping* (ICS) is an international trade association comprising national ship-owning associations from around the globe.[32] It was created in 1948 as a successor to the International Shipping Conference.[33] ICS is comprised of national shipping federations and it represents all types of ship-owners at a global level. The *International Association of Independent Tanker Owners* (INTERTANKO), on the other hand, was created in 1970 specifically to represent tanker-owners and in particular those tanker-owners who are not controlled by oil companies or by

22 IMO Convention, Article 62.

23 1992 Fund Convention, Article 18(10); Guidelines on Relations between the International Oil Pollution Compensation Fund 1992 and Intergovernmental and International Non-governmental Organisations. Hereinafter, Guidelines.

24 See www.imo.org/home.asp?topic_id=315& doc_id=851 [checked 12 June 2008].

25 See *IOPC Funds Annual Report 2006* (2007, p. 24).

26 Guidelines, at para. B.1(a).

27 Guidelines, at para. B.1(c).

28 Guidelines, at para. B.2.

29 Guidelines on the Grant of Consultative Status, in (2004) *IMO Basic Documents, 2004 edition, volume I*. London: International Maritime Organization, p. 129.

30 See Tully (2007, p. 3).

31 Tully (2007, p. 4).

32 www.marisec.org/ics/icswhat.htm [checked 4 August 2009].

33 See Bekiashev and Serebriakov (1982, p. 124).

states.[34] INTERTANKO provides a forum for its members to meet and to discuss policies, which are then represented at the international level.

The interests of some ship-owners are also represented through an additional body which brings together thirteen of the major mutual insurance societies or so-called Protection & Indemnity (P & I) Clubs. P & I Clubs are important bodies which provide mutual insurance to ship-owners for third-party liabilities. Representing many of the largest and most influential P & I Clubs, the *International Group of P & I Clubs* (International Group) plays an important part in advocacy at the international level, representing its members in many international organisations. However, the International Group is much more than a representational organisation. It plays a significant role in reinsuring the collective policies of the constituent P & I Clubs[35] and its vital role in the maritime insurance industry means that it has a significant influence in the field of liability and compensation.[36]

As they are the primary contributors to the International Fund, oil companies also have a considerable interest in developments in the inter-governmental regime on oil pollution liability and compensation. The major multinational oil companies created the *Oil Companies International Maritime Forum* (OCIMF) in 1970 as a response to the increased awareness of oil pollution following the *Torrey Canyon* spill. The OCIMF was subsequently incorporated in Bermuda in 1977 and it operates a secretariat in London, where the headquarters of the International Maritime Organisation and the International Oil Pollution Compensation Funds are also located.[37] Today, the Forum comprises around 70 companies worldwide and it continues to co-ordinate the views of the oil industry at inter-governmental organisations and negotiations.

It is not only business and industry groups which are involved in the operation of the inter-governmental regime. Given the potential devastating effects of oil pollution on wildlife and marine ecosystems, a variety of Environmental Non-Governmental Organisations (ENGOs) have also sought to influence the development of the inter-governmental regime through their lobbying activities. Groups such as the *International Union for the Conservation of Nature* (IUCN) and *Friends of the Earth International* (FOEI) have shown an active interest in marine policies and their impact on the environment. In addition, there are some ENGOs which have a specialist interest in maritime policy, such as the *Advisory Committee on the Protection of the Seas* (ACOPS).

Despite the differences in their interests and motivations, all these types of NGOs have the same formal status within the inter-governmental regime. Whilst NGOs are recognised as legitimate participants in the inter-governmental regime, as will be seen below, their influence is limited.

One of the principal advantages of consultative or observer status within the inter-governmental regime is that it gives NGOs access to documents and the ability to attend meetings.[38] Moreover, observers are able to make their own written submissions to meetings of these institutions on topics which are already on the agenda, and they can participate in discussions.[39] Indeed, many of the BINGOs and ENGOs involved in the inter-governmental regime regularly participate in discussions and they have a significant influence on shaping law and policy.[40] At the same time, there also

34 www.intertanko.com/templates/Page.aspx?id=1069 [checked 4 August 2009].

35 www.igpandi.org/About [checked 4 August 2009].

36 See the discussion of STOPIA and TOPIA in section 3.3 below.

37 www.ocimf.com/ [checked 4 August 2009].

38 See Rules Governing Relationship with Non-Governmental International Organisations, in (2004) *IMO Basic Documents, 2004 edition, volume I.* London: International Maritime Organisation, p. 121. See also Rules of Procedure for the Assembly of the International Oil Pollution Compensation Fund Established under the 1992 Fund Convention, Rule 6.

39 Rules of Procedure for the Assembly of the International Fund, Rule 6.

40 See Vorbach (2001, p. 34).

appear to be some major limitations on the ability of these non-state actors to influence the decision-making process. In particular, NGOs have no vote,[41] which means that they have no formal way in which to influence the outcome of the decision-making process. Whether or not this is a significant disadvantage is questionable in light of the fact that voting rarely takes place within these institutions.[42] Perhaps more significant, however, is the fact that NGOs are prevented from being able to introduce new agenda items[43] and therefore they are limited to reacting to the initiatives of governments unless they can persuade a government to introduce a proposal on their behalf. It follows that formal modification of the inter-governmental regime is largely at the fiat of states, confirming their predominant role in the making of international law. As one author concludes, 'whatever influence [NGOs] have is achieved through the attractiveness of their ideas and values. No NGO is guaranteed influence . . . Influence must be constantly earned' (Charnowitz, 2006, p. 348). This conclusion, it would seem, is also valid for the inter-governmental regime on oil pollution liability and compensation. Yet, as will be discussed below, the development of the inter-governmental regime is only one way in which this issue can be regulated.

3 Private regimes for oil pollution liability and compensation

3.1 The emergence of global law beyond the state

The preceding analysis of the way in which the inter-governmental regime operates accords with the common view that 'states retain a tight grip on the formal law-making processes, even in those areas where NGOs have had greatest impacts' (Boyle and Chinkin, 2007, p. 95). Yet, such a view concentrates solely on the formal sources of international law and it overlooks other potential forms of global norms. The emerging concept of global law beyond the state is based upon a conception of the international community which is not solely composed of states as the exclusive actors, but which includes an increasing number of non-state actors operating at the global level.[44] This social diversity opens up the possibility of an emerging legal pluralism, as law may be formed through the transnational associations of non-state actors as well as through the inter-governmental regimes based on formal sources of international law. One way of describing non-state law is in terms of private regimes which result from discourses between non-state actors at various levels, be it subnational, national or transnational.[45] Teubner thus suggests that global law may be produced through 'specialized, organizational and functional, networks' (Teubner, 1997, p. 7). This view of global law does not necessitate the emergence of entire legal systems; rather it concentrates on the development of autonomous legal mechanisms such as clusters of rules or institutions.[46]

Lex mercatoria is often held up as an archetypal global law without a state, as it is produced by the transnational activities of economic actors without the intervention of the state.[47] The globalised nature of the shipping and maritime industries makes them prime candidates for developing global non-state law. For instance, Muchlinski cites the marine insurance industry as an early example of

41 See Rules Governing Relationship with Non-Governmental International Organisations.

42 *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organisation*, IMO Document LEG/MISC/4, p. 7.

43 See Rules Governing Relationship with Non-Governmental International Organisations. The position is similar in the International Fund; see Rules of Procedure of the Assembly, Rule 14.

44 See, e.g., Teubner (1997).

45 For a general discussion of transnational private regimes, see Bruce Hall and Biersteker (2002).

46 See Griffiths (1986, p. 12).

47 See Teubner (1997, p. 3). See also Mertens (1997, p. 31).

collective standardisation through the commercial practices of transnational actors.[48] However, the influence of non-state actors is not necessarily limited to commercial or economic matters. Transnational associations and networks can be formed for a variety of purposes, including those areas which have been traditionally associated with the regulatory powers of the state. In this vein, the following sections will consider examples of transnational private regimes in the field of oil pollution liability and compensation.

3.2 TOVALOP and CRISTAL

As noted above, the shipping and oil industries are actively involved in the inter-governmental regime on oil pollution liability and compensation through the IMO and the International Fund. Indeed, from the very beginning, these non-state actors asserted their own interests in the development of the inter-governmental regime. For instance, the Comité Maritime International (CMI), a transnational network of maritime law organisations which had long played a role in developing treaties on the subject of maritime law, submitted a proposed draft text of a treaty creating an international compensation system to the IMO Legal Committee and it continued to make suggestions throughout the drafting process. In addition, representatives of the shipping industry and the oil industry attended the negotiations at the IMO and the diplomatic conferences in 1969 and 1971, through which they had significant inputs into the regime that was ultimately created.[49]

At the same time, the early activities of the BINGOs were not limited to lobbying governments through the inter-governmental negotiations. These groups also took proactive measures to regulate oil pollution liability and compensation themselves. TOVALOP and CRISTAL are two interrelated contractual agreements entered into by actors from the maritime industry, and which together form a private regime on oil pollution liability and compensation.

TOVALOP is an acronym for the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution.[50] This Agreement was initiated by the seven major oil companies in 1969 and it was intended to influence the negotiations towards an inter-governmental agreement in the IMO, as well as to prevent unilateral action by states pending the entry into force of an inter-governmental regime.[51] In its original form, the Agreement was designed to reimburse the costs of cleaning up oil spills incurred by governments subject to a maximum level of liability. Thus, TOVALOP shared many features with the Civil Liability Conventions, although there were some crucial differences.[52] The Agreement first came into operation in January 1969, and for a time it was the only 'global' instrument which provided a source of compensation for oil pollution damage until the 1969 Civil Liability Convention entered into force in June 1975.

CRISTAL stands for the Contract Regarding an Interim Settlement of Tanker Liability for Oil Pollution.[53] Like TOVALOP, it was intended to influence the negotiations taking place over the creation of a second layer of oil pollution compensation at the 1971 diplomatic conference. CRISTAL was a compensation scheme of last resort, and it was designed to supplement the compensation available under TOVALOP. The Contract created the Oil Companies Institute for Marine Pollution Compensation Ltd, which was responsible for collecting contributions from those oil companies

48 Muchlinski (1997, pp. 86–87).

49 See M'Gonigle and Zacher (1979, pp. 143–199); Tan (2006, p. 286).

50 Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (1969) *International Legal Materials* 8: 497.

51 M'Gonigle and Zacher (1979, pp. 156–157).

52 For an analysis of the instruments, see Becker (1973–74).

53 Contract Regarding an Interim Settlement of Tanker Liability for Oil Pollution (1971) *International Legal Materials* 10: p. 137.

who were members of the scheme and paying compensation to victims of oil pollution damage. CRISTAL entered into force in April 1971, and again it provided an important source of compensation pending the entry into force of the 1971 Fund Convention in October 1978.[54] As one early work on the topic of oil pollution compensation noted, 'the TOVALOP/CRISTAL package has been a simple, efficient, and effective method of covering some additional costs of pollution not dealt with by either TOVALOP or the 1969 Convention' (M'Gonigle and Zacher, 1979, p. 182).

The two arrangements discussed above continued to operate, in amended forms, alongside the inter-governmental regime until they were finally terminated in 1997.[55] By then it was deemed that 'the continued existence of the voluntary agreements could slow progress by acting as a disincentive to States which have not yet ratified [the 1992] Protocols',[56] thus impliedly recognising that the private regimes could be perceived as being in direct competition with the inter-governmental regime.

3.3 STOPIA and TOPIA

STOPIA and TOPIA constitute a further set of private agreements, which were introduced by the shipping industry in 2005/2006. The background to STOPIA and TOPIA is the discussions over the reform of the inter-governmental regime which were being pursued through the inter-governmental institutions of the International Fund.[57] Some modifications to the inter-governmental regime were forthcoming, including raising the limits of liability under both the 1992 Civil Liability Convention and the 1992 Fund Convention with effect from 1 November 2003 in order to reflect the increasing size of serious oil spills.[58] Perhaps more importantly, a third tier of compensation was created by the adoption of an additional protocol to the 1992 Conventions.[59] The 2003 Protocol establishes a Supplementary Fund which, like the 1992 Fund, is financed by oil importers in those states that are party to the protocol. The effect of the Supplementary Fund is that 'in practically all cases, it will be possible from the outset to pay compensation for claims in States parties to the Protocol at 100% of the amount of the damage agreed between the Fund and the victim' (*IOPC Funds Annual Report 2004*, 2005, p. 41). However, the participants in the inter-governmental regime were unable to achieve consensus on other aspects of reform. States were split between those who were against any revision of the 1992 Convention and those who considered that there were a number of outstanding issues which needed to be addressed and which could result in revision of the inter-governmental regime.[60] By 2005, it was clear that the inter-governmental negotiations had reached an impasse.

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54 See Tan (2006, p. 302).

55 See International Oil Pollution Compensation Fund, 'TOVALOP and CRISTAL', Document FUND/EXC.46/9, 30 November 1995.

56 International Oil Pollution Compensation Fund, 'TOVALOP and CRISTAL', Document FUND/EXC.46/9, 30 November 1995.

57 For a summary of the discussions of the Intersessional Working Group established to consider the adequacy of the inter-governmental regime, see *IOCP Funds Annual Report 2005* (2006, pp. 28–33). The final report of the Working Group is produced as Document 92FUND/A.10/7.

58 See resolutions adopted by the IMO Legal Committee at its 82nd session.

59 The Protocol entered into force on 3 March 2005; see www.iopcfund.org/92members.htm#supfund [checked 4 August 2009].

60 See in particular Report on the Ninth Meeting of the Third Intersessional Working Group on the Review of the International Compensation Regime, Document 92FUND/A.10/7; *IOPC Funds Annual Report 2005* (2006, p. 31).

It was at this time that another initiative was proposed by a sector of the maritime industry. At the tenth session of the 1992 Fund Assembly, the International Group of P & I Clubs announced that if the decision to revise the Conventions was put on hold, the Clubs would be prepared to adopt voluntary, but legally binding, arrangements to address the perceived imbalance in the sharing of the financial burden between the shipping and oil industries, which was one of the motivations for reform.[61] This initiative resulted in the adoption of STOPIA and TOPIA.[62] The objective of both agreements is to ensure a balance between the contributions of tanker-owners and oil receivers to oil pollution compensation.[63] A short overview of each instrument will be considered below, before considering what consequences they have for the inter-governmental regime on oil pollution liability and compensation.

STOPIA, or the Small Tanker Oil Pollution Indemnification Agreement, seeks to address the disparity in the liability of small tankers under the 1992 Civil Liability Convention on the one hand, and the oil industry through their contributions to the International Fund under the 1992 Fund Convention on the other.[64] The Agreement operates to indemnify the 1992 Fund for oil pollution damage caused by small tankers of less than 29,548 tons which are insured through a P & I Club and reinsured through the Pooling arrangements of the International Group.[65] The Agreement provides that 'where, as a result of an Incident, an Entered Ship causes Pollution Damage in respect of which (i) liability is incurred under the Liability Convention by the Participating Owner of that ship and (ii) the 1992 Fund has paid or expects to pay compensation under the 1992 Fund Convention, the said Owner shall indemnify the 1992 Fund in an amount calculated in accordance with this clause'.[66] This agreement operates so as to significantly raise the liability of some small tanker-owners from 4.51 million units of account (£3.4 million) under the international treaties to 20 million units of account (£15.2 million).[67] At the same time, it concurrently reduces the burden of the International Fund and therefore the costs to be borne by the oil industry.

TOPIA, or the Tanker Oil Pollution Indemnification Agreement, is a similar scheme applying to tankers of all sizes. It is intended to indemnify the 2003 Supplementary Fund for 50 percent of the compensation it pays for damage caused by tankers in Protocol States.[68] As with STOPIA, tankers may participate in the scheme provided that they are insured by a Club and they are reinsured through the Pooling Arrangements of the International Group.[69]

It is clear from this brief description of STOPIA and TOPIA that they have important consequences for the inter-governmental regime on oil pollution liability and compensation. Yet, they were created completely out-with that framework. Indeed, the two instruments are not part of international law at all. It is doubtful whether the individual P & I Clubs or the International Group have the legal personality to conclude international treaties in the first place. What, then, is the legal status of the agreements and how do we explain their interaction with the inter-governmental regime?

61 See *IOPC Funds Annual Report 2005* (2006, p. 32).

62 Originally, these instruments were offered as alternatives. However, the package developed by the International Group provided that both instruments would apply concurrently. See *IOPC Funds Annual Report 2005* (2006, p. 32).

63 See preambles to the agreements.

64 The original proposal for STOPIA was only intended to apply to incidents occurring in states which had ratified the 2003 Protocol. The 2006 version is therefore much wider in scope and it addresses the balance of liability in a much more fundamental way. See *IOPC Funds Annual Report 2005* (2006, p. 44).

65 STOPIA 2006, Article III(b). There is some flexibility in these eligibility criteria; see Article III(d).

66 STOPIA 2006, Article IV(a).

67 STOPIA 2006, Article IV(c)(1). The deduction applies irrespective of whether or not the Participating Owner is entitled to limit his or her liability.

68 TOPIA 2006, Article XVI(c).

69 TOPIA 2006, Article XV(b).

3.4 Understanding the interaction between the private regimes and the inter-governmental regime

Both STOPIA and TOPIA take the form of contracts governed by English law, and they are enforceable through the English courts.[70] Moreover, both instruments make it expressly clear that they confer legally enforceable rights of indemnification on the 1992 Fund or on the 2003 Supplementary Fund, respectively.[71] In this sense, they are similar to their predecessors, TOVALOP and CRISTAL, which were also binding contracts.[72]

At the same time, there are also significant differences between the two sets of private regimes. On the one hand, TOVALOP and CRISTAL applied concurrently but independently of the inter-governmental regime. As noted above, they competed with the inter-governmental regime by offering alternative sources of compensation for oil pollution damage.[73] In contrast, there is a close interaction between STOPIA and TOPIA and the inter-governmental regime. Indeed, STOPIA and TOPIA are expressly designed to operate in conjunction with the inter-governmental regime. Furthermore, this interconnection is explicitly recognised by the international organisations operating the inter-governmental regime. Thus, in response to the two private agreements, the Assemblies of the 1992 Fund and the 2003 Supplementary Fund have adapted their own internal procedures to take into account the existence of STOPIA and TOPIA. The Assemblies of the Funds adopted a procedure at their eleventh session in October 2006 which determines how the 1992 Fund and the 2003 Supplementary Fund interact with the International Group in the administration of STOPIA and TOPIA.[74] The relationship between the International Funds and the private regimes is further governed by a memorandum of understanding (MOU) between the 1992 Fund and the 2003 Supplementary Fund on the one hand, and the International Group on the other, signed on 16 April 2006. Thus, whilst STOPIA and TOPIA fall short of de jure amending the limits of liability and compensation laid down in the inter-governmental regime, it cannot be doubted that the de facto consequence of these agreements is to alter the share of liability between ship-owners and the oil industry thereunder.

For these reasons, it is suggested that the private regimes described above illustrate that the role of non-state actors in global law-making is greater than may be suggested by an analysis focused on the inter-governmental regime and the formal sources of international law. It appears that international law is no longer the only mechanism through which oil pollution liability and compensation can be regulated globally. Whilst the treaties remain an important part of the overall regulatory regime, it is also necessary to take into account other forms of normative activity in order to fully understand the global regulation of oil pollution liability and compensation. Private regimes are an important feature of the normative landscape in this area of regulation. Moreover, these two types of regime interact, and it follows that it is only possible to accurately describe global law-making in this

70 STOPIA 2006, Article XII; TOPIA 2006, Article XXIV.

71 STOPIA 2006, Article XI(A); TOPIA 2006, Article XXIII(A).

72 CRISTAL was enforceable in the English courts; CRISTAL, Article IX(A). See, however, West of England Shipowners Mutual Insurance Association (Luxembourg) v Cristal Ltd (The Glacier Bay) [1996] 1 *Lloyd's Reports* 370. In contrast, TOVALOP provided that any disputes should be submitted to arbitration; TOVALOP, Article VII(K). Ultimately, of course, arbitral awards also depend upon the enforcement jurisdiction of a state.

73 Tan (2006, p. 311). Of course, there were practical linkages between the two regimes, as explained by Tan: 'ever since the original CLC/FUND regime became widely adopted, the industry schemes had typically served to re-adjust and fine-tune the burden of claim settlements between the ship-owning and oil interests inter se. . . . Readjustment of liabilities did not disturb the total amounts of compensation available to injured third parties under the CLC/FUND conventions; it merely sought to re-distribute the liabilities of the industries as between themselves by way of indemnification' (p. 316).

74 Administrative procedure for indemnification of the 1992 Fund and the Supplementary Fund by Shipowners/Clubs under STOPIA2006/TOPIA2006; see document 92FUND/A.11/29, 11 October 2006.

field through a concept of regime plurality that takes into account several, overlapping, regimes, each resting upon different normative foundations.[75]

The existence of overlapping, and occasionally interdependent, global regimes also has some practical implications for the law-making process. What STOPIA and TOPIA illustrate is that there may be more than one way in which to make changes to the overall functioning of the regulatory regime. Indeed, what is striking about the example of private law-making offered by STOPIA and TOPIA is that non-state actors were able to modify the regulatory regime when states participating in the inter-governmental regime had been unable to agree on a suitable way forward. Both approaches achieve similar results, even though they are affected through different legal mechanisms.

It is clear from the examples that private regimes can offer advantages in terms of being able to facilitate relatively rapid changes in the overall regulatory regime without having to rely upon the cumbersome amendment mechanisms found in the international treaties. Thus, TOVALOP and CRISTAL provided an important source of compensation pending the entry into force of the international treaties which had been negotiated by states. Similarly, STOPIA and TOPIA were able to introduce almost immediate changes to the balance of liability between tanker-owners and oil importers without the need to wait for states to complete formal acceptance under the treaty amendment procedures.

On the other hand, the advantages of speed and flexibility come at a price. One weakness of the private regimes is their scope and effectiveness. Whilst the private regimes do place binding obligations on their participants, it is inherent in their contractual nature that participation is in the first place voluntary. One consequence of this arrangement is that not all relevant actors will necessarily be part of the private regime. Thus, although the explanatory notes to STOPIA and TOPIA explain that ships insured through P & I Clubs will automatically be entered into the schemes, the two agreements make clear that participating owners may withdraw from the scheme by giving three months' written notice to the Club.[76] Moreover, there are many tankers which may fall out-with the scheme altogether because they are not affiliated to the International Group. A recent example is the case of the Volgoneft 139 which sank in the Black Sea in November 2007, spilling between 1200 and 2000 tonnes of fuel oil.[77] The spill has caused widespread pollution damage to some 250 kilometres of coastline and more than 30,000 birds are estimated to have been killed in the incident. However, as the Volgoneft 139 was not insured through one of the P & I Clubs belonging to the International Group, it is not covered by STOPIA and the tanker-owner will only be liable for the lower limits of compensation under the Civil Liability Convention.[78] This potential for regulatory gaps is one of the weaknesses of a voluntary private regime as opposed to regulation by states through international law or national law.

There are also important questions of process legitimacy that are raised by the emergence of private regimes and their interaction with inter-governmental structures.[79] Private regimes obviously confer a degree of power on those non-state actors who control the regime. In the case

75 This is captured by Santos's notion of 'interlegality', which recognises that pluralistic legal orders are not necessarily autonomous but that they interact with one another; see Santos (1995, p. 472). See also Twining (2000, p. 230).

76 STOPIA 2006, Article X; TOPIA, Article XXII. This aspect of the private regimes has been a bone of contention for some states; see International Oil Pollution Compensation Fund, 'Record of Decisions of the Twelfth Session of the Assembly', Document 92FUND/A.12/28, 19 October 2007, paras 26.1-26.12.

77 For more details, see *IOPC Fund Annual Report 2008* (2009, p. 116).

78 Admittedly there are more serious problems in this particular case. First, the owners of the Volgoneft 139 were declared bankrupt in March 2008 by the Russian courts. Second, the Volgoneft 139 was not fully insured in accordance with the Civil Liability Convention so there is an insurance gap of about £1.3 million.

79 For a general discussion of the legitimacy of private regimes, see e.g. Claire Cutler (2002, pp. 23–40).

of STOPIA and TOPIA, the International Group of P & I Clubs are alone capable of making amendments to the rules therein, without a right of participation of any other actors, be it states or other non-state actors.[80] This is in contrast to the inter-governmental regime, which seeks to ensure that a wide range of interests are represented in the law-making process.

At the same time, the ability of the BINGOs to influence the law-making process through private regimes should not be overestimated. States continue to play a leading role in developing the global regime. Most importantly, states may agree to modify and amend the treaties in the same way as before, rendering any changes under private regimes ineffectual or unnecessary. Indeed, STOPIA and TOPIA explicitly recognise this fact, and they furthermore provide that the Agreements will terminate on the entry into force of any international instrument which materially and significantly changes the system of compensation established by the 1992 Liability Convention, the 1992 Fund Convention and the 2003 Protocol.[81] These clauses make clear that the agreements are subject to any alternative arrangements that may be made through amendments to the inter-governmental regime. In the end, whilst the private regimes offer a different way of influencing the normative framework for the regulation of oil pollution liability and compensation, they do not necessarily imply a loss of power for states or a total substitution for the inter-governmental regime.

4 Conclusion

This paper has sought to explore the various regimes which exist in relation to the global regulation of oil pollution liability and compensation. Whilst there are several important international treaties on this topic, the analysis has shown that these instruments do not exhaust the potential normative sources in this area of regulation. In particular, commercial actors in the maritime sector have created several transnational private regimes which, whilst voluntary in origin, are nevertheless normative in nature and which have significantly contributed to the global regulation of oil pollution liability and compensation. Moreover, the adoption of STOPIA and TOPIA by the International Group of P & I Clubs in 2006 demonstrates how private regimes can be used to modify the practical operation of the inter-governmental regime itself. As a result, the overall scheme for the regulation of oil pollution liability and compensation at the global level can only be understood through the interplay of these different regimes. Nevertheless, this analysis does not assume that law-making by states is becoming redundant or less important. The formal sources of international law remain a key means of global regulation in relation to oil pollution liability and compensation. Indeed, it is often the threat of regulation by states through international law or national law that influences non-state actors to create private regimes in the first place.

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80 STOPIA, Article VII; TOPIA, Article XIX.

81 STOPIA 2006, Article IX(b); TOPIA 2006, Article XXI(b).

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